Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

SOUTHWESTERN BELL TELEPHONE, L.P.,
F/K/A SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, *ET AL.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 20, 2003

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QUESTION PRESENTED

Whether 47 U.S.C. § 253(a) establishes with the clarity required by *Gregory v. Ashcroft*, 501 U.S. 452 (1991), that Congress intended to intrude on the States' authority to control their subordinate political subdivisions by preempting state laws that prevent those subdivisions from offering certain telecommunications services.

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The Missouri Municipal League; the Missouri Association of Municipal Utilities; City Utilities of Springfield; City of Sikeston Board of Utilities; Columbia Water & Light; and the American Public Power Association were petitioners both in the court of appeals and before the Federal Communications Commission ("FCC").

The FCC and the United States of America were respondents in the court of appeals.

Southwestern Bell Telephone, L.P., f/k/a Southwestern Bell Telephone Company, and the State of Missouri were intervenors in the court of appeals and participated in the proceedings before the FCC.

The City of O'Fallon, Missouri; the City of St. Louis, Missouri; GTE Service Corporation (and its affiliated telecommunications companies), MCI Telecommunications Corporation; the National Telephone Cooperative Association; UTC, The Telecommunications Association; and Missouri River Energy Services participated in the proceedings before the FCC.

The National Association of Telecommunications Officers and Advisors and the United Telecom Council participated as *amici curiae* in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Southwestern Bell Telephone, L.P., states the following:

Southwestern Bell Telephone, L.P., f/k/a Southwestern Bell Telephone Company, is a wholly owned subsidiary of SBC Communications Inc., a publicly held corporation. SBC Communications Inc. has no parent company, and no publicly owned company owns 10% or more of its stock.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Southwestern Bell Telephone, L.P., f/k/a Southwestern Bell Telephone Company ("Southwestern Bell"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 299 F.3d 949. The order of the Federal Communications Commission (Pet. App. 12a-39a) is reported at 16 FCC Rcd 1157.

JURISDICTION

The opinion of the court of appeals was entered on August 14, 2002. On November 20, 2002, petitions for rehearing and rehearing en banc were denied. Pet. App. 40a. On February 10, 2003, Justice Thomas granted Southwestern Bell an extension of time within which to file a petition for certiorari to and including March 20, 2003. *Id.* at 41a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 253(a) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 253(a), provides:

> No State or local statute or regulation, or other State or local regulatory requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

Additional provisions of the Communications Act and of the Missouri Revised Statutes relevant to this case are reproduced at Pet. App. 42a-50a.

STATEMENT

This case presents a clear and acknowledged circuit split between the D.C. Circuit and the Eighth Circuit. This circuit split involves a pure question of law as to the meaning of a federal statute. The split, moreover, is of particular importance both because it subjects the Federal Communications Commission ("FCC") to inconsistent judicial commands, and thus impedes rational implementation of the Telecommunications Act of 1996 ("1996 Act"), and because it involves the extent to which Congress intended to diminish the power of the States to control their political subdivisions, an issue of significant structural importance in our federalist system. For all these reasons, the Court should grant certiorari.

1. The 1996 Act. As this Court has stated, the 1996 Act is an "unusually important legislative enactment." *Reno v. ACLU*, 117 S. Ct. 2329, 2337 (1997). Before passage of the 1996 Act, local telephone service was thought to be a natural monopoly. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). States thus granted an exclusive franchise to a single carrier in each area and regulated the exclusive franchisees, known as incumbent local exchange carriers ("ILECs"), as public utilities. *See id.* Among other things, States required this single private carrier to provide "universal" service (that is, service at affordable rates to all who desire it) and closely supervised its rates.

The 1996 Act seeks to transform this exclusive-franchise model of local telecommunications by inducing other private competitors to deploy their own facilities and compete in the provision of local telecommunications. Congress expressly concluded that "meaningful facilities-based competition is possible" in local telecommunications. S. Conf. Rep. No. 104-230, at 148 (1996). It therefore set out a framework for introducing full facilities-based competition and "accelerat[ing] rapidly *private sector* deployment of advanced telecommunications and information technologies and services." *Id.* at 113 (emphasis added); *see AT&T*, 525 U.S. at 371 ("Technological advances . . . have made competition among multiple providers of local service seem possible, and Congress recently ended the longstanding regime of state-sanctioned monopolies.").

Section 253 codifies Congress's desire to end the prior regime under which a single private company was granted an exclusive franchise to provide local service. Section 253(a) provides that no state or local law "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

Sections 253(b) and (c) then establish that, notwithstanding the general rule of section 253(a), States maintain significant authority to apply state law in this area to preserve important state policies. Section 253(b) thus provides that "[n]othing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title [which addresses universal service], requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." Section 253(c) similarly preserves States' authority to regulate rights-of-way.

Section 253(d) gives the FCC authority, after "notice and an opportunity for public comment," to "preempt the enforcement" of state or local statutes that are contrary to section 253(a) or (b) "to the extent necessary" to correct the "violation or inconsistency."

2. The Missouri Statute. Beginning before Congress passed the 1996 Act, municipalities throughout Missouri proposed various methods through which they could become competitive providers of telecommunications services. But, as regulators of private telecommunications companies, these cities exercised or proposed to exercise their control over access to public rights-of-way and other governmental powers as a means to attain an unfair competitive advantage over private telecommunications providers.

For example, a proposed telecommunications franchise code for the City of St. Peters would have required any user of a public right-of-way, in the course of any work installing, repairing, replacing, or upgrading its own telecommunications facilities, to "install and dedicate to the City either a state of the art telecommunications compatible conduit . . . or at least four optic fibers, at the City's option, . . . [to] be used by the City for whatever purposes it may deem appropriate, including rental to the Franchisee or other applicants."[1] The City would have had these free facilities available to compete directly with the carrier that installed them or indirectly by leasing the facilities to a competitor. A similar ordinance was proposed in Kansas City.[2]

Additionally, in the City of Springfield, it took one carrier more than seven months to negotiate a pole attachment agreement with the City of Springfield's municipally owned utility ("City Utilities"), apparently because the municipally owned utility was simultaneously demanding that the carrier

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[1] City of St. Peters Proposed Ordinance, Telecommunications Franchise Regulatory Code, § 25.8-5(a)(5) (July 11, 1995) (Respondents' C.A. App. 174-76).

[2] "As part of the total compensation paid to the City for the right of an operator to occupy public property and conduct its business, the City shall require as part of a franchise or license agreement access to the system for transmission of video, audio, data or other signals. . . . The City may interconnect other systems, including its own, using appropriate technology that will not impair the operators' systems." Kansas City Draft Ordinance 960656, Chapter 25, Code of Ordinances — Communications Transmission Systems, § 25-71 (May 23, 1996) (Respondents' C.A. App. 178-79).

lease excess fiber capacity from the city.[3] And after the municipally owned utility under-bid Southwestern Bell for a fiber-optics project, the City of Springfield's own mayor accused City Utilities of using its control of public utility poles to learn details, including the prices, of Southwestern Bell's proposal.[4]

After conducting hearings and reviewing the history of efforts by municipalities to gain unfair competitive advantages through abuse of their regulatory authority, the Missouri General Assembly enacted H.B. 620 in August 1997. With limited exceptions, that statute prevents political subdivisions of the State from offering or providing telecommunications services. The pertinent statutory provision establishes that "[n]o political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required pursuant to this section." Mo. Rev. Stat. § 392.410(7) (2001). Under Missouri law, a certificate of authority is required to provide intrastate interexchange and local exchange telecommunications service. *See id.* § 392.410(2).

Although, as originally passed, this statute was set to expire in August 2002, last year the Missouri Assembly extended it through August 2007. The Assembly also amended the relevant statutory provision to allow some sales of telecommunications services and facilities to telecommunications providers, but the basic proscription on political subdivisions providing telecommunications services remains. *See id.* § 392.410(7) (2002). Accordingly, that amendment does not alter the legal question posed here.

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[3] *See* Deborah Barnes, *CU Restraining Trade, Firm Alleges*, Springfield News-Leader, Dec. 30, 1996, at 1B.

[4] Tamiya Kallaos & Ron Sylvester, *CU Abusing Power, Mayor Says*, Springfield News-Leader, Mar. 13, 1997, at 1A ("'[City Utilities] has been privy to all these negotiations,' [Mayor] Gannaway said. 'They knew every detail about it — what Bell was charging. All they had to do was undercut them on the price.'").

3. The FCC Proceedings. In July 1998, the Missouri Municipal League as well as several other parties[5] (collectively, the "Missouri Municipals") filed a petition with the FCC asking that the Commission exercise its authority under section 253(d) to preempt H.B. 620. In particular, they requested that the FCC preempt that state statute to the extent that it prevented municipalities and municipally owned utilities from providing telecommunications services.

The FCC rejected those petitions and declined to preempt the Missouri statute.[6] In reaching that conclusion, the FCC relied heavily on its prior determination in a case involving a legally indistinguishable question. In that earlier decision, known as the *Texas Preemption Order*,[7] the FCC determined that a Texas statute that also prevented political subdivisions from providing telecommunications services[8] was not preempted by section 253(a).

In the *Texas Preemption Order*, the FCC reasoned that section 253(a) could preempt such state laws only if it spoke

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[5] The other parties were the Missouri Association of Municipal Utilities, City Utilities of Springfield, Columbia Water & Light, and City of Sikeston Board of Utilities.

[6] Although the FCC's order determined that municipally owned utilities that have "an independent corporate identity that is separate from the state" may be "entities" for purposes of section 253(a), *see* Pet. App. 13a-14a (¶ 2), the Missouri statute would not apply to them in any case. By its terms, the Missouri statute applies only to "political subdivisions."

[7] Memorandum Opinion and Order, *The Public Utility Commission of Texas, et al., Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, 13 FCC Rcd 3460 (1997).

[8] The Texas statute prevented a "municipality" from obtaining a certificate necessary to provide telecommunications service or from "'offer[ing] for sale to the public, either directly or indirectly, . . . a service for which a certificate is required or any non-switched telecommunications service to be used to provide connections between customers' premises within the exchange or between a customer's premises and a long distance provider serving the exchange.'" *Texas Preemption Order*, 13 FCC Rcd at 3540-41, ¶ 173 (quoting Texas Pub. Util. Reg. Act of 1995 § 3.251(d), Tex. Rev. Civ. Stat. Ann. art. 1446c-0 (West Supp. 1996)).

with the clarity required by the plain-statement rule of *Gregory v. Ashcroft*, 501 U.S. 452 (1991). That rule applied because Texas's determination of what powers to delegate to its political subdivisions was a "fundamental state decision[]" with which "'Congress does not readily interfere,' absent a clear indication of intent." *Texas Preemption Order*, 13 FCC Rcd at 3545-46, ¶ 181 (quoting *Gregory*, 501 U.S. at 461). In this regard, the FCC relied heavily on the long string of cases from this Court establishing that political subdivisions are "'subordinate governmental instrumentalities'" whose powers "'rest[] in the absolute discretion of the State.'" *Id.* at 3545, ¶¶ 180, 181 (quoting *Sailors v. Board of Educ.*, 387 U.S. 105, 107-08 (1967)).

The FCC found no such plain statement. It reasoned that section 253(a) "appears to prohibit restrictions on market entry that apply to independent entities *subject to state regulation*, not to political subdivisions of the state itself. If we were to construe the term 'entity' in this context to include municipalities, which . . . are mere 'instrumentalities' of the state, section 253 effectively would prevent states from prohibiting their political subdivisions from providing telecommunications services, despite the fact that states could limit the authority of their political subdivisions in all other respects." *Id.* at 3547, ¶ 184 (emphasis added).

On review of the *Texas Preemption Order*, the D.C. Circuit affirmed the FCC's judgment. *See City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999). Like the FCC, the court of appeals determined that the plain-statement rule of *Gregory* applied. *See id.* at 52. And, again like the FCC, the court concluded that the *Gregory* rule was not satisfied because section 253(a) did not speak with the "unmistakable clarity" necessary to conclude that Congress intended to "alter[] the State's governmental structure." *Id.* Although it was "linguistically possible" that a political subdivision could be considered an "entity" covered by section 253(a), that result was not compelled by the text and thus the court would not conclude that Congress intended to invalidate state laws that restricted the activities of political subdivisions. *See id.* at 52-53.

In the order at issue here, the FCC found the *Texas Preemption Order* and its affirmance in *City of Abilene* to be controlling. The FCC concluded that it was "presented . . . with the same issue that [it] addressed in the *Texas Preemption Order*." Pet. App. 23a (¶ 12). Accordingly, as it had in its prior order, the FCC determined that section 253(a) did not clearly intend to deprive States of the right to control subordinate state governmental bodies. The FCC stated that "the term 'any entity' in section 253(a) of the Act was not intended to include political subdivisions of the state, but rather appears to prohibit restrictions on market entry that apply to independent entities subject to state regulation." *Id.* at 19a (¶ 9).

Three FCC commissioners filed statements agreeing that the correct legal result was that the Missouri statute had not been preempted, but voicing the opinion that, as a policy matter, States should not enact such laws and Congress should act clearly to preempt them. *See id.* at 36a-37a, 38a-39a.

4. The Eighth Circuit Proceedings. The Missouri Municipals filed a petition for review of the FCC's judgment in the Eighth Circuit, which was the only court of appeals other than the D.C. Circuit with venue over their petition. *See* 47 U.S.C. § 402(a); 28 U.S.C. § 2343 (establishing jurisdiction to review FCC orders in the D.C. Circuit as well as in the circuit in which the petitioner resides).

In granting the petition for review, the Eighth Circuit expressly disagreed with the D.C. Circuit's conclusion in *City of Abilene* and vacated the order of the FCC. The Eighth Circuit explained that, despite its "desire to maintain uniformity among the circuits," in its view, the D.C. Circuit's decision was not "persuasive." Pet. App. 9a. In parting ways with the D.C. Circuit, the Eighth Circuit did not dispute that the *Gregory* plain-statement rule applies here. *See id.* at 5a-6a. Instead, unlike both the FCC and the D.C. Circuit, the Eighth Circuit found that rule to be satisfied. In this regard, the Eighth Circuit found Congress's use of the word "any" to be particularly important evidence that Congress intended to

preempt state laws limiting political subdivisions' ability to provide telecommunications services. *Id.* at 7a ("Congress's use of 'any' to modify 'entity' signifies its intention to include within the statute all things that could be considered as entities.").

The FCC and the United States, as well as Southwestern Bell, sought rehearing and/or rehearing en banc. Those petitions were denied. *Id.* at 40a.

REASONS FOR GRANTING THE PETITION

I. THIS CASE PRESENTS A SQUARE AND ACKNOWLEDGED CIRCUIT CONFLICT ON AN IMPORTANT QUESTION OF LAW

a. This case presents a square circuit conflict on a pure question of law. As the Eighth Circuit expressly acknowledged, the D.C. Circuit in *City of Abilene* addressed the same issue presented here. The Eighth Circuit did not conclude — and could not have concluded — that the D.C. Circuit case differed in any material respect from this one. On the contrary, the Eighth Circuit specifically acknowledged that, *despite* its "desire to maintain uniformity among the circuits," it was declining to follow the D.C. Circuit "holding" because it believed that *City of Abilene* was not "persuasive." Pet. App. 9a. The FCC has similarly concluded that its decision at issue here presents the "same issue" that it "addressed in the *Texas Preemption Order*" that was affirmed in *City of Abilene*. *Id.* at 23a (¶ 12).

This case thus presents a true conflict. There can be no doubt that, if the Missouri Municipals had filed their petition for review in the D.C. Circuit, as they could have done under 28 U.S.C. § 2343, the result would have been different. As in *City of Abilene*, the FCC's order would have been affirmed.

By itself, the existence of this square conflict on a pure question of law — whether section 253(a) prevents States from preventing their political subdivisions from providing

telecommunications services — provides a compelling basis to grant this petition for certiorari. *See* Sup. Ct. R. 10(a).[9]

b. The circuit conflict is particularly significant here because it prevents rational implementation of a federal statute by the FCC, the agency to which Congress expressly assigned that task. *See* 47 U.S.C. § 253(d).

Because of the circuit conflict on the issue presented here, the FCC cannot sensibly decide preemption cases involving the many state statutes that prohibit or limit political subdivisions from offering telecommunications services.[10] As noted above, venue for review of FCC preemption decisions such as this one is proper in both the D.C. Circuit and the circuit in which the petitioner resides. *See* 47 U.S.C. § 402(a); 28 U.S.C. § 2343. Accordingly, if the FCC were to follow the Eighth Circuit's mandate and conclude that section 253 preempts a state statute limiting political subdivisions' provision of telecommunications services, the aggrieved party could seek review in the D.C. Circuit, where *City of Abilene* would require reversal. Conversely, if the FCC followed its prior precedent, the petitioner could seek review in the circuit where it resides, which could well lead to reversal as well — and would certainly do so in all the Eighth Circuit States.

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[9] Other state and federal courts have also disagreed on this issue. *See Iowa Tel. Ass'n v. City of Hawarden*, 589 N.W.2d 245, 252 (Iowa 1999) (finding that "any entity" did not provide "a clear indication" of congressional intent to remove a power that "has traditionally been within the purview of the states"); *Municipal Elec. Auth. of Georgia v. Georgia Pub. Serv. Comm'n*, 525 S.E.2d 399, 403 (Ga. Ct. App. 1999) (similarly declining to find preemption); *City of Bristol v. Earley*, 145 F. Supp. 2d 741, 747-48 (W.D. Va. 2001) (finding preemption); *In re Lincoln Elec. Sys.*, 655 N.W.2d 363, 369-72 (Neb. 2003) (same).

[10] *See, e.g.*, Ala. Code §§ 11-50B-1 *et seq.* (Supp. 2002); *id.* § 11-50B-3; Ark. Code Ann. § 23-17-409 (Michie 2002); Fla. Stat. Ann. §§ 125.421, 166.047, 196.012(6), 199.183(1)(b), 212.08(6) (2000 & Supp. 2003); Iowa Code Ann. §§ 23A.2, 384.81 (West 1999 & Supp. 2002); Minn. Stat. Ann. § 237.19 (West 1992); Neb. Rev. Stat. Ann. §§ 86-128(1)(b), 86-575(2) (Michie Supp. 2002); Nev. Rev. Stat. § 268.086 (Supp. 2001); Tenn. Code Ann. §§ 7-52-601 *et seq.* (Supp. 2001); Va. Code Ann. § 15.2-1500 (Michie Supp. 2002).

The disagreement between the circuits thus prevents the FCC from implementing this significant provision of the 1996 Act in a coherent way. Certiorari is warranted to address this uncertainty in this important area of law and to provide the FCC with guidance as to how to implement section 253.[11]

c. Finally, as the State of Missouri has explained in its petition for certiorari (No. 02-1238), the split of authority here is also particularly significant because it relates to the extent that the federal government has decided to strip the States of the power to control their political subdivisions — a core issue in our federal system. This case thus implicates this Court's important role in ensuring that Congress has clearly intended to alter the balance of power between the States and the federal government — here, by depriving States of control of their subdivisions — and it is thus especially appropriate for the Court to grant certiorari and resolve the circuit conflict here.

II. THE EIGHTH CIRCUIT WRONGLY ATTRIBUTED TO CONGRESS AN INTENT TO ALTER THE BALANCE BETWEEN THE STATES AND THE NATIONAL GOVERNMENT WITHOUT UNMISTAKABLY CLEAR LANGUAGE IN THE STATUTE

Although the clear split between the circuits provides more than ample basis for the Court to grant certiorari here, the need for certiorari is all the more compelling because the Eighth Circuit's decision wrongly attributes to Congress an intent to deprive States of their traditional authority to control the actions of their own political subdivisions.

a. As an initial matter, there can be no serious dispute that the plain-statement rule of *Gregory* applies to the issue presented here. This Court has long recognized that States tradi-

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[11] This issue is also of importance because of what appears to be increasing municipal interest in providing telecommunications. *See* Paula L. Stepankowsky, *Portland's Phone-Business Foray Is Studied by Other Large Cities*, Wall St. J. Online, Mar. 11, 2003.

tionally maintain "*absolute discretion*" in determining the "number, nature and duration" of the powers conferred on their political subdivisions. *Sailors*, 387 U.S. at 107-08 (internal quotation marks omitted; emphasis added); *accord Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991).[12] As the Court explained just last Term, "'[t]he principle is well settled that local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in [the State's] absolute discretion.'" *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 122 S. Ct. 2226, 2234 (2002) (quoting *Mortier*, 501 U.S. at 607-08).

The question whether Congress intended to deprive States of their long-recognized authority to control absolutely the powers exercised by their political subdivisions implicates a "fundamental" attribute of a State's sovereignty; it thus requires application of the *Gregory* standard. *Gregory*, 501 U.S. at 460; *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 543 (2002) (plain-statement rule applies when "Congress intends to pre-empt the historic powers of the States or when it legislates in traditionally sensitive areas that affect the federal balance") (internal quotation marks and brackets omitted). Indeed, just last year, the Court expressly stated that the question of what authority to delegate to municipalities was a "question central to state self-government." *City of Columbus*, 122 S. Ct. at 2234. Moreover, as in *Gregory* itself, this case involves the "structure of [state] government" — the power of a State to determine which officers and bodies will possess which powers within the State. 501 U.S. at 460. As *Gregory* stressed, it is through such decisions that a "State defines itself as a sovereign." *Id.*; *see also City of Abilene*, 164 F.3d at 52 (petitioners' claim was that

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[12] Missouri law accords with this Court's understanding of the relationship between the State and its political subdivisions. *See Century 21-Mabel O. Pettus, Inc. v. City of Jennings*, 700 S.W.2d 809, 811 (Mo. 1985) (under Missouri law, "[a] municipality derives its governmental powers from the state and exercises generally only such governmental functions as are expressly and impliedly granted it by the state").

section 253 "altered the State's governmental structure"). Accordingly, under *Gregory*, the federal courts must ensure that Congress plainly intended to infringe on state authority here.

In fact, there has been wide agreement on the applicability of *Gregory* to the issue presented here. Both the Eighth Circuit and the D.C. Circuit expressly concluded that *Gregory* applies. *See* Pet. App. 6a ("[T]he *Gregory* rule requires us to determine whether the statutory language plainly requires preemption."); *City of Abilene*, 164 F.3d at 52 (concluding that, because the relationship between a State and its subdivisions "strikes near the heart of State sovereignty," "§ 253(a) must be construed in compliance with the precepts laid down in *Gregory*"). The FCC has likewise determined that *Gregory* applies to the issue presented here. *See Texas Preemption Order*, 13 FCC Rcd at 3545, ¶ 181. Even the Missouri Municipals did not dispute in the Eighth Circuit that, for the Missouri statute to be preempted, section 253 would have to satisfy the *Gregory* standard. *See* Missouri Municipals C.A. Opening Br. at 30 (8th Cir. filed Mar. 26, 2001).

b. The *Gregory* standard is a demanding one that is not satisfied here. Under *Gregory* and its progeny, a federal statute may not be construed to intrude on fundamental state prerogatives such as the ones at issue here unless Congress has spoken with "unmistakabl[e]" clarity. 501 U.S. at 460 (internal quotation marks omitted). That plain statement, moreover, must appear on the face of the statute, not in a legislative report or floor statement. *See id.* at 467 (intent to impinge on state authority "must be plain to anyone reading the Act").

There is no such plain statement on the face of section 253(a). That provision states that no state or local law "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." This provision was plainly intended to preempt state laws preserving exclusive franchises and thus to allow *private* companies to compete in local telecommunications markets. Section 253(a) thus opens the door for "accel-

erat[ed] . . . *private sector* deployment of advanced telecommunications and information technologies and services." S. Conf. Rep. No. 104-230, at 113 (1996) (emphasis added).

That conclusion is strongly bolstered by section 253(b) and (c), through which Congress expressly preserved States' authority under state law to pursue important policies of local concern, including universal service and consumer protection, even if those policies might be inconsistent with section 253(a). *See, e.g.*, 47 U.S.C. § 253(b) ("Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title [relating to universal service], requirements necessary to preserve and advance universal service, protect the public safety and welfare . . . and safeguard the rights of consumers."). It would be extremely odd for Congress to be so expressly solicitous of these state-law policies in section 253(b) and (c), yet at the same time preempt a state judgment that the State itself and its instrumentalities should not enter the private market. At the least, if Congress did intend to create such a dichotomy, one would expect — and *Gregory* requires — significantly more clarity on this point on the face of section 253(a).

Moreover, Congress's use of the bland term "entity" hardly demonstrates with unmistakable clarity that it specifically intended to preempt such limitations on States and their instrumentalities. An "entity" is a "thing with distinct and independent existence"[13] or "[s]omething that exists as a particular and discrete unit."[14] As we have emphasized, under settled law, municipalities are not "distinct" and "independent" from the State, and thus are not clearly encompassed within the "entities" covered by section 253(a). Indeed, in other cases where Congress has intended to encompass municipalities within a statutory definition, it has expressly referred to "public entities," which it then defined to include such bodies. *See Pennsylvania Dep't of Corrections v.*

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[13] *New Oxford American Dictionary* 568 (2001).

[14] *Webster's II New College Dictionary* 376 (1999).

Yeskey, 524 U.S. 206, 210 (1998) (evaluating the Americans with Disabilities Act's definition of "public entity," which was defined to include "'any department, agency, special purpose district, or other instrumentality of a State or States or local government'") (quoting 42 U.S.C. § 12131(1)(B)).

Similarly, despite the Eighth Circuit's extensive reliance on the fact, the use of the word "any" does not establish that Congress plainly desired to override state authority here. As an initial matter, in section 253(a), the word "any" modifies "entity," which, as demonstrated above, both generally and in this context normally connotes an independent thing — a class that does not include political subdivisions of the States.

Additionally, and in any event, this Court's recent decision in *Raygor* undermines the Eighth Circuit's belief that use of the word "any" is sufficient to satisfy the plain-statement rule. *Raygor* involved the scope of 28 U.S.C. § 1367(d), which provides for the tolling of a state statute of limitations period "for any claim" that is ultimately dismissed by a federal court that had been filed under the court's supplemental jurisdiction. The question was whether section 1367(d) applies even where the claim is dismissed on Eleventh Amendment grounds. The Court recognized that the plain-statement rule applies in such contexts. *See* 534 U.S. at 544 (quoting *Gregory*, 501 U.S. at 461).

The Court found that the statute's general reference to "*any* claim" was insufficient to constitute a plain statement under *Gregory*. It explained:

> [W]e have previously found similarly general language insufficient to satisfy clear statement requirements. For example, we have held that a statute providing civil remedies for violations committed by "'*any* recipient of Federal assistance'" was "not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment" even when it was undisputed that a state defendant was a recipient of federal aid. Instead, we held that "when Congress chooses to subject the States to federal jurisdiction, it must do so specifically." Likewise, § 1367(d) reflects

> no specific or unequivocal intent to toll the statute of limitations for claims asserted against nonconsenting States . . . .

Id. at 544-45 (citations and internal brackets omitted) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 245-46 (1985)). Thus, the Court concluded, "although § 1367(d) may not clearly exclude tolling for claims against nonconsenting States dismissed on Eleventh Amendment grounds, we are looking for a clear statement of what the rule *includes*, not a clear statement of what it *excludes*." *Id.* at 546. On that basis, the Court concluded that the plain-statement rule was not satisfied. *See id.*

The same analysis applies here. While it may not be extraordinarily clear that Congress intended section 253(a) *not* to apply to laws limiting the activities of state subdivisions, it is also not unmistakably clear that it intended to include such laws within the scope of section 253(a)'s preemption.[15] Under these circumstances, the *Gregory* standard has not been satisfied. The Eighth Circuit's decision is thus inconsistent with this Court's precedent and misreads section 253(a).

CONCLUSION

The petition for a writ of certiorari should be granted.

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[15] Although the Eighth Circuit placed great emphasis on this Court's earlier decision in *Salinas v. United States*, 522 U.S. 52 (1997), that case, which involved the federal anti-bribery statute, did not implicate the same sovereignty interests as does this case or *Raygor*. There was no risk in *Salinas* that the Court's broad reading of the anti-bribery statute would interfere with a State's sovereign authority to regulate its own affairs. By concluding that Congress had been sufficiently clear in broadly prohibiting bribes in connection with "any business, transaction, or series of transactions," the Court in *Salinas* did not assert — as the Eighth Circuit seemed to believe — that the use of the word "any" will always suffice to overcome the presumption of *Gregory*.

Respectfully submitted,

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